

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Parts 1 and 63 of the)	IB Docket No. 04-47
Commission's Rules)	
)	
{Rules Applicable to International)	
47 U.S.C. § 214 Authorizations;)	
Rules Relating to Provision of U.S.)	
International Telecommunications)	
Services; and Cable Landing)	
License Compliance with the)	
Coastal Zone Management Act of)	
1972 - 16 U.S.C. §§ 1451 et.sec.})	

COMMENTS OF THE DEPARTMENT OF DEFENSE

The Secretary of Defense, through duly authorized counsel, pursuant to Section 201 of the Federal Property and Administrative Services Act of 1949 (see 40 U.S.C. § 481 [former provision] and 40 U.S.C. § 501(a)(2)) [current provision]), and the memorandum of understanding between the Department of Defense and the General Services Administration dated November 27, 1950, hereby files these comments in the interests of national security.

Statement of Interest and Position

The Commission's existing rules and procedures (as implemented by the International Bureau) provide the

Department of Defense with effective notice before granting authorizations, licenses, or transfers of the same, with respect to international telecommunications services, when certain foreign ownership or interest(s) thresholds are met. As a result, the Department of Defense has time to identify any adverse impact on military operations or agreements, and to liaise with other Executive Branch Departments and Agencies, to identify ways to mitigate any perceived risks the proposed actions might entail prior to any action being taken by the Commission. One of the Commission's new proposals would provide additional information on foreign involvement in U.S. international telecommunications services that would provide additional information on potential risks to national security interests; this initiative is welcomed by the Department of Defense.

In this NPRM, the International Bureau, acting on behalf of the Commission, raises for comment several proposed changes to their established rules and procedures. In particular, the Commission seeks comment on, *inter alia*, how national security and law enforcement interests may be affected by certain proposed modifications of the rules.

(In the matter of Amendment of Parts 1 and 63 of the Commission's Rules, FCC 04-40, IB Docket No. 04-47 at paragraph 32 (Adopted February 25, 2004, Released March 4,

2004.) The Department of Defense is limiting its comments in this filing to portions of two of the issues raised in the NPRM, and respectfully requests to be permitted to reserve comment on the remaining issues until other comments have been received by the Commission, in the interests of national security.

I Commonly-Controlled Subsidiaries

In the NPRM (Id. at ¶¶ 27-32) the Commission is considering amending Section 63.21(h) of its rules to allow commonly-controlled subsidiaries to provide international service under a parent's international section 214 authorization. Currently only a wholly-owned subsidiary may provide international service pursuant to its parent's authorization. A commonly-controlled subsidiary must obtain its own international section 214 authorization. This issue has been addressed previously, when in the *2000 International Biennial Review Order*, the Commission considered a request from Cingular that section 63.21(h) be modified to allow commonly-controlled subsidiaries to use their parent's international section 214 authorization.¹ Again in the 2002 biennial regulatory review proceeding, Cingular renewed its request that the Commission modify section 63.21(h) to allow commonly-controlled subsidiaries

¹ *2000 International Biennial Review Order*, 17 FCC Rcd at 11433, ¶ 41.

to use their parent's authorization rather than having to obtain their own authorizations.² Recently 47 C.F.R. § 63.21 has been upheld by the United States Court of Appeals for the District of Columbia in Cellco Partnership v. F.C.C., 357 F.3d 88 (D.C. Cir. 2004) which stated (in part): "... we hold that the Commission reasonably interpreted § 11 to require it to "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule -- that [the rule] was needed to further the public interest -- remains valid..." March 2003 Report, 18 FCC Rcd at 4735. As noted in prior Commission rulings, a controlling interest that does not amount to 100-percent ownership may raise issues that require separate review, such as additional foreign affiliations or minority ownership or beneficial interest by persons or entities that are barred from holding a Commission authorization.³ The Department of Defense requests that this rule be retained in its current form so it may continue to receive notification of proposed shifts in foreign ownership interests prior to any action by the Commission. The Department of Defense concurs with the

² Cingular comments, IB Docket No. 02-309, at 8-12.

³ 2000 *International Biennial Review Order*, 17 FCC Rcd at 11433 ¶ 41, citing 1998 *International Biennial Review Order*, 14 FCC Rcd at 4932-33, ¶ 56. The provisions of section 63.21(h) were contained in section 63.21(i) when the Commission reviewed the requirement in the 2000 *International Biennial Review Order*.

Department of Justice that post-action notification of such transactions would not be in the public interest.

II Changes to Less than 50 Percent Ownership

In the NPRM (Id. ¶ 36) the Commission proposes to clarify 47 C.F.R. § 63.24 to require reporting of changes in certain controlling interests. With increasing globalization of telecommunications services, it is often difficult for the Department of Defense to track shifts in control of U.S. International Telecommunications Services, aside from certain national security-related contracts.⁴ Increasingly, since many Department of Defense telecommunications contracts do not require direct access by contractors to classified data, nor do these contracts require the contractor to maintain a facility clearance, there are no contractual requirements to report foreign ownership or control matters. If the Commission adopts a revised rule that would require telecommunications services providers to report changes to foreign controlling interests (e.g., if a specific foreign ownership interest became less than 50 percent), that type of FCC reporting could assist the Department of Defense in identifying and assessing any

⁴ The Secretary of Defense has entered into agreements with many Departments and Agencies for the purpose of rendering industrial security services.

potential impact on national security by highlighting changes in controlling interests in telecommunications service providers. Such a report, advising the Commission of all interests at the time that the controlling foreign interest decreases, could provide data that would inform the Department of Defense prior national security concerns had been mitigated (with respect to a particular provider), which could increase competition for future Defense contract actions, and potentially reduce costs.

Under Executive Order 12829--National Industrial Security Program January 6, 1993, the President established a program to (in part): "...to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government..." The Secretary of Defense, in consultation with all affected agencies and with the concurrence of the Secretary of Energy, the Nuclear Regulatory Commission, and the Director of Central Intelligence, was tasked to issue the National Security National Industrial Security Program Operating Manual. If security specifications are required in these "classified" contracts, then the Department of Defense must be notified if certain factors arise during the life of one

of these contracts.⁵ No such notice is required for unclassified Defense contracts.

Conclusion

The Department of Defense asserts the public interest would be served by retaining 47 C.F.R. § 63.21(h) in its present form (which would include notification prior to Commission action on applications subject to the current reporting requirement.) In addition, the Department of Defense would support the Commission's proposed clarification of 47 C.F.R. § 63.24 to require reporting of

⁵ DoD 5220.22-M, NATIONAL INDUSTRIAL SECURITY PROGRAM OPERATING MANUAL (NISPOM) 1995 incorporating Change One (July 1997) & Change Two (Feb 2001) paragraph 2-302.b. requires reporting of (1) Ownership or beneficial ownership, direct or indirect, of 5 percent or more of the applicant company's voting securities by a foreign person; (2) Ownership or beneficial ownership, direct or indirect, of 25 percent or more of any class of the applicant company's non-voting securities by a foreign person; (3) Management positions, such as directors, officers, or executive personnel of the applicant company held by non U.S. citizens; (4) Foreign person power, direct or indirect, to control the election, appointment, or tenure of directors, officers, or executive personnel of the applicant company and the power to control other decisions or activities of the applicant company; (5) Contracts, agreements, understandings, or arrangements between the applicant company and a foreign person; (6) Details of loan arrangements between the applicant company and a foreign person if the applicant company's (the borrower) overall debt to equity ratio is 40:60 or greater; and details of any significant portion of the applicant company's financial obligations that are subject to the ability of a foreign person to demand repayment; (7) Total revenues or net income in excess of 5 percent from a single foreign person or in excess of 30 percent from foreign persons in the aggregate; (8) Ten percent or more of any class of the applicant's voting securities held in "nominee shares," in "street names," or in some other method that does not disclose the beneficial owner of equitable title; (9) Interlocking directors with foreign persons and any officer or management official of the applicant company who is also employed by a foreign person; (10) Any other factor that indicates or demonstrates a capability on the part of foreign persons to control or influence the operations or management of the applicant company; and (11) Ownership of 10% or more of any foreign interest.

changes in foreign controlling interests as described in the
NPRM.

Respectfully submitted,



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